Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ATTORNEY FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

Whether Judge Weinshienk's stay orders were appealable under 28 U.S.C. § 1292(a)(1).

Whether Judge Weinshienk's stay orders were an abuse-of-discretion.

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IN THE
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JAMES EDWARD QUALLS,
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v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James Edward Qualls and David L. Smith hereby petition the Supreme Court of the United States for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

Reference is hereby made to the unpublished orders issued by the United States Court of Appeals for the Tenth Circuit on September 14, 1994, October 17, 1994 and January 5, 1995.

JURISDICTION

28 U.S.C. § 1254 is the statutory provision believed to confer on the Supreme Court jurisdiction to review the referenced orders by writ of certiorari. The facts necessary to establish jurisdiction under § 1254 are set forth in the statement of the case to this petition.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1292(a)(1) provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions."

STATEMENT OF THE CASE

James Edward Qualls is an African-American citizen of the United States who was employed as a bus operator by the Regional Transportation District ("RTD") in Denver, Colorado from April 16, 1979 to September 20, 1989. On September 20, 1989, an RTD supervisor by the name of James Misek terminated Mr. Qualls from his employment because of a September 2, 1989 incident in which he was falsely accused of threatening a passenger on his bus with a knife and then making a false report about the incident. Mr. Misek terminated Mr. Qualls from his employment without first giving him a due process hearing or otherwise following RTD's termination policies and procedures. The acting general manager of the RTD, Richard D. Bauman, and other high-ranking RTD officials subsequently ratified and

finalized Mr. Misek's actions. The real reasons for terminating Mr. Qualls from his employment were racial discrimination and retaliation for his report of a threat made by Mr. Misek to the Denver District Attorney's Office for prosecution under applicable criminal laws. Amalgamated Transit Union filed a grievance on Mr. Qualls' behalf and took the matter to arbitration; but the arbitrator issued a decision rubber-stamping the unconstitutional actions by the RTD and its officials.

On June 10, 1991, Mr. Qualls filed suit in the United States District Court for the District of Colorado (United States District Judge Zita L. Weinshienk presiding), and proceeded pro se until March 26, 1992. Mr. Qualls' amended complaint (filed on April 6, 1992) charged a conspiracy by and among the

RTD, Richard Bauman, Robert Garside, Richard Reynolds, Ellsworth Walker, and James Misek to deprive him of his civil rights under 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986; Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e et seq.; the 13th and 14th Amendments to the United States Constitution; the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and Colorado common law. Subject matter jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343 and 1367.

On November 29, 1993, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit issued its disciplinary order holding that Mr. Qualls' attorney, David L. Smith, had filed "frivolous" appeals in

four civil rights cases originally filed in the United States District Court for the District of Colorado.[1] See In re

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[1]Before issuing its (November 29, 1993) disciplinary order, the disciplinary panel denied Mr. Qualls' attorney's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. (See also Fed. R. App. P. 46, requiring a hearing, if requested, before taking any appropriate disciplinary action against any attorney.) In that request, Mr. Qualls' attorney said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Mr.

Qualls' attorney after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases were "frivolous"; and was unable to present the financial information necessary to show that he is financially unable to pay the more than $50,000.00 in totally unwarranted sanctions imposed against him by the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado.

The disciplinary panel denied Mr. Qualls' attorney's request to reconsider whether the appeals in the four civil rights cases were "frivolous," holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] However, this holding was contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel"; and created an irrebuttable presumption of guilt that deprived Mr. Qualls' attorney of procedural and substantive due process of law.

The disciplinary panel said:

David L. Smith, 10 F.3d 723 (10th Cir. 1993). The disciplinary panel suspended Mr. Qualls' attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Mr. Qualls' attorney may apply for reinstatement to the Tenth Circuit bar

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> At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may reapply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

However, since the suspension of Mr. Qualls' attorney by the disciplinary panel is based, in part, on his alleged misconduct in the District Court, for which he has already been severely sanctioned, he is being subjected to multiple excessive punishments for the same conduct, in violation of the double jeopardy provision of the Fifth Amendment to the United States Constitution.

when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. The Tenth Circuit subsequently denied Mr. Qualls' attorney's petition for rehearing and suggestion for rehearing en banc.

On December 8, 1993, Mr. Qualls' attorney was served with the following letter notice from the lawyer-chairman of the Committee on Conduct of the United States District Court for the District of Colorado:

> The United States District Court and its Committee on Conduct have received notice that you have been suspended from the practice of law before the United States Court of Appeals for the Tenth Circuit in an Original Proceeding, Case No. 93-631 until all sanctions are paid; that suspension is or was to be effective commencing November 29, 1993.
>
> You are hereby notified that pursuant to D.C.COLO.LR 83.6P, simultaneous and identical discipline shall be imposed by the United States District Court for the

> District of Colorado nunc pro tunc from the date of judgment of the United States Court of Appeals for the Tenth Circuit.
>
> You are further notified that within ten (10) days of receiving this Notice, you may show cause in writing why simultaneous discipline should not have been imposed.

Ms. Qualls' attorney subsequently responded to the chairman's letter; and a meeting to discuss the letter and response was held by a three-lawyer investigatory committee.

On February 16, 1994, Judge Weinshienk issued her order completely reversing her (January 25, 1994) ruling that "the [Qualls] case will continue with Mr. Smith representing the plaintiff until such time as there is a ruling by this court that he may not appear"; granting RTD's attorneys' (February 4, 1994) motion to stay the proceedings and to vacate the trial setting of April 25,

1994; and staying the case "pending the Committee on Conduct's determination of plaintiff's counsel's status." Judge Weinshienk further ordered Mr. Qualls to notify the Court "when a decision is made regarding plaintiff's counsel's status."

On March 17, 1994, Mr. Qualls appealed Judge Weinshienk's (February 16, 1994) stay order to the United States Court of Appeals for the Tenth Circuit. Appellate jurisdiction was based on 28 U.S.C. § 1292(a)(1).

On or about May 6, 1994, Mr. Qualls' attorney was served with the three-lawyer investigatory committee's letter recommendation with respect to his practice status in the United States District Court for the District of Colorado. Mr. Qualls' attorney subsequently objected to the recommendation; and a hearing was ordered

by the District Court's three-judge disciplinary panel.

On June 17, 1994, Judge Weinshienk issued her order continuing the stay of Mr. Qualls' case "until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status." Judge Weinshienk issued a similar stay order in Howard v. Mail-Well Envelope Company, et al., Civil Action No. 93-Z-1895 (D. Colo.), as did United States District Judge Edward W. Nottingham in Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92-N-243 (D. Colo.). Mr. Qualls' attorney is attorney for plaintiff in each of these civil rights cases.

On July 15, 1994, Mr. Qualls and his attorney appealed Judge Weinshienk's (June 17, 1994) stay order to the United

States Court of Appeals for the Tenth Circuit. Appellate jurisdiction was again based on 28 U.S.C. § 1292(a)(1).

On September 14, 1994, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit issued the following Order:

> This appeal is jurisdictionally defective because the order being appealed is not final. See 28 U.S.C. § 1291.
>
> This is an appeal from an order of the district court staying the proceedings below until the status of plaintiff's counsel's right to practice before the district court is clarified.
>
> A final decision is a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). "A stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.'" Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 10 n. 11 (1983); see also Pioneer Properties, Inc. v. Martin, 776 F.2d 888, 890-891 (10th Cir. 1985).

The appellant appears to argue that the order is an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1). This argument is without merit. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279 (1988)("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)"). See also Hamilton v. Robertson, 854 F.2d 740, 741 (5th Cir. 1988). (There is "a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable[.]").

The appellee's Motion for Damages and Costs, and for Show Cause Order and Sanctions is referred to the disciplinary panel.

The appendix filed by the appellant is stricken. The record has been transmitted by the district court. See 10th Cir. R. 10.2.2. ("In pro se appeals . . . the clerk of the district court shall transmit the record to the clerk of the court of appeals . . .").

The appellee's motion to file a supplemental appendix is denied without prejudice to being renewed

before the disciplinary panel.

APPEAL DISMISSED.

Qualls v. Regional Transportation District, No. 94-1127 (10th Cir.). The Tenth Circuit subsequently (on October 17, 1994) denied Mr. Qualls' petition for rehearing and suggestion for rehearing en banc.

On January 5, 1995, a hearing panel of the United States Court of Appeals for the Tenth Circuit issued the following Order:

> This matter comes on for consideration of the parties' responses to this court's notice of jurisdictional defect.
>
> If this notice of appeal is treated as such, then this appeal would be dismissable for lack of jurisdiction.
>
> However, we elect to treat the notice of appeal as a petition for writ of mandamus. We take judicial notice of the fact that on October 11, 1994 the district court entered an order lifting the stay and setting the case for trial for

October 28, 1995.

Accordingly, the petition is DENIED.

The appellee's motion for leave to supplement the appendix is denied.

The appellant's request for sanctions against the appellant is denied.

The appellee's request for sanctions is referred to the disciplinary panel.

Qualls v. Regional Transportation District, No. 94-1314 (10th Cir.).

ARGUMENT

A. JUDGE WEINSHIENK'S STAY ORDERS WERE APPEALABLE UNDER 28 U.S.C. § 1292(a)(1).

In Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989), the Court held:

> We must first determine whether or not we have jurisdiction to hear this appeal and, if so, the scope of that jurisdiction. As a general rule, only final decisions of the

district courts are appealable. 28 U.S.C. § 1291 (1982). A statutory exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1) (1982), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."

Tri-State and REA appeal the district court's order which expressly denies their request for a permanent injunction. Although the order is interlocutory, [footnote omitted] it is appealable under section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides us with jurisdiction to hear this appeal.

We agree with the Eleventh Circuit in Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1471 (11th Cir. 1985), that an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1). Cases such as Carson v. American Brands, Inc., 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), and Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 107 S.Ct. 1177, 1183-84, 94 L.Ed.2d 389 (1987), which require an additional showing that the interlocutory order might have a "serious, perhaps irreparable,

> consequence" and that the order can be "effectually challenged" only by immediate appeal, are inapposite. Carson and its progeny do not deal with interlocutory orders that explicitly deny or grant a motion for injunctive relief but with orders that have "the practical effect of refusing an injunction." Carson, 450 U.S. at 84, 101 S.Ct. at 996; see I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc., 789 F.2d 21, 24 n. 3 (D.C.Cir.) ("Carson does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."), cert. denied, 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice and Procedure § 3924 (1977 & Supp. 1987) [hereinafter Wright & Miller]. When an order, although not expressly denying or granting an injunction, has the practical effect of doing so, the Carson line of cases extends the coverage of section 1292(a)(1) and allows the order to be appealable under that section, but only if the additional requirements are satisfied.

Id. at 1351. See also Mai Basic Four, Inc. v. Basis, Inc., 962 F.2d 978, 980-83 (10th Cir. 1992).

In the present case, Mr. Qualls appealed Judge Weinshienk's (February 16, 1994) order, which expressly stayed his case "pending the Committee on Conduct's determination of plaintiff's counsel's status." Mr. Qualls and his attorney appealed Judge Weinshienk's (June 17, 1994) order, which expressly stayed his case "until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status." Although these orders were interlocutory, they granted injunctive relief and were therefore appealable under the plain language of section 1292(a)(1), and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provided the United States Court of Appeals for the Tenth Circuit with jurisdiction to hear these appeals.

B. JUDGE WEINSHIENK'S STAY ORDERS WERE AN ABUSE-OF-DISCRETION.

D.C. COLO. LR 83.6P (ATTORNEY DISCIPLINED BY OTHER COURTS) provides, in part, as follows:

> 1. Upon notice that any member of this court's bar has been disciplined by any state or other federal court, simultaneous and identical discipline shall be imposed by this court nunc pro tunc from the date of the other court's judgment. . . .

By creating an irrebuttable presumption of guilt and imposing punishment without affording a due process evidentiary hearing, this local rule is unconstitutional on its face under the Fifth Amendment to the Constitution of the United States.

Judge Weinshienk's application of the local rule to order a stay of Mr. Qualls' case "pending the Committee on Conduct's determination of plaintiff's counsel's status" and then "until final

action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status" was also unconstitutional. First, the stay orders inappropriately interfered with Mr. Qualls' First Amendment right to petition the government for a redress of grievances and/or his Seventh Amendment right to a jury trial; and with his right to be represented by the attorney of his choice. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. . . ."); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967);

United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984).

Second, the stay orders inappropriately punished Mr. Qualls' attorney before he was convicted of any inappropriate conduct, thus depriving him of procedural and substantive due process of law; and inappropriately interfered with his right to represent his client. See United States v. Dickstein, 971 F.2d 446, 451 (10th Cir. 1992). Unlike the attorney in Dickstein, Mr. Qualls' attorney claims an interest in or right to represent his client in this suit which he seeks to vindicate. Specifically, Mr. Qualls' attorney claims

a property interest in this suit because of his contingent fee agreement with his client. He claims a right to represent his client in this suit because of his First Amendment right, as a member in good standing of the bar of the United States District Court for the District of Colorado, to petition the government for a redress of his client's civil rights grievances.

Third, the stay orders are in conflict with the following Supreme Court holding in McKnight v. General Motors Corporation, ___ U.S.___, 114 S.Ct. 1826 (1994):

> The Court of Appeals correctly rejected petitioner's argument that § 101 [of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV)] applies retroactively. See Landgraf v. USI Film Products, 511 U.S. ____ (1994); Rivers v. Roadway Express, Inc., 511 U.S. ____ (1994). However, if the only basis for the order imposing sanctions on

> petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal of sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. [Citation omitted.]

In the present case, the (November 29, 1993) disciplinary order issued by the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit held that Mr. Qualls' attorney had filed "frivolous" appeals in four civil rights cases originally filed in the United States District Court for the District of Colorado. Three of the four appeals involved the issue of

whether interlocutory sanctions orders are immediately appealable. The disciplinary panel held that this issue was foreclosed by circuit precedent prohibiting such appeals.[2] However, at the time these appeals were filed, the Supreme Court had not yet ruled on the issue of whether interlocutory sanctions orders are immediately appealable. Indeed, the Supreme Court has still not ruled on this issue. Filing an appeal was the only way Ms. Qualls' attorney could preserve this issue pending a possible favorable decision by the

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[2]In G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), the Court held: "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." The Court also held that such a sanction order is not appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

Supreme Court.

Furthermore, there was a circuit conflict on the question of whether interlocutory sanctions orders are immediately appealable, with the majority of circuits permitting such appeals.[3]

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[3]See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against

The answer to this question was therefore not so clear as to make the position of Mr. Qualls' attorney "frivolous" or sanctionable.

The fourth appeal filed by Mr. Qualls' attorney did not involve the issue of whether interlocutory sanctions orders are immediately appealable; but the Tenth Circuit disciplinary panel

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counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

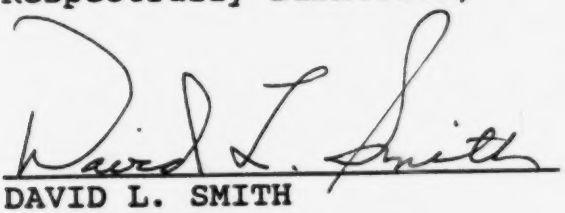
adopted the Tenth Circuit hearing panel's conclusion that the appeal should never have been filed. While the reasons, if any, for the Tenth Circuit hearing panel's conclusion were never made clear, filing an appeal was, once again, the only way Mr. Qualls' attorney could preserve the issues raised on appeal pending a possible favorable decision by the Supreme Court. The answers to these questions were not so clear as to make the position of Mr. Qualls' attorney "frivolous" or groundless.

CONCLUSION

Judge Weinshienk's stay orders were appealable under 28 U.S.C. § 1292(a)(1), and were an abuse-of-discretion. Mr. Qualls and his attorney therefore request the Supreme Court to grant their petition for a writ of certiorari, and such other and further relief as may be just under

the circumstances.

Respectfully submitted,



DAVID L. SMITH

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Denver, Colorado 80202
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ATTORNEY FOR PETITIONERS

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 94-1127

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES EDWARD QUALLS,

Plaintiff-Appellant,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Defendants-Appellees.

ORDER ISSUED BY A THREE-JUDGE HEARING PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON SEPTEMBER 14, 1994

This appeal is jurisdictionally defective because the order being appealed is not final. See 28 U.S.C. § 1291.

This is an appeal from an order of the district court staying the

proceedings below until the status of plaintiff's counsel's right to practice before the district court is clarified.

A final decision is a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). "A stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.'" Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 10 n. 11 (1983); see also Pioneer Properties, Inc. v. Martin, 776 F.2d 888, 890-891 (10th Cir. 1985).

The appellant appears to argue that the order is an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1). This argument is without merit. See Gulfstream Aerospace Corp. v. Mayacamas

Corp., 485 U.S. 271, 279 (1988)("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)"). See also Hamilton v. Robertson, 854 F.2d 740, 741 (5th Cir. 1988). (There is "a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable[.]").

The appellee's Motion for Damages and Costs, and for Show Cause Order and Sanctions is referred to the disciplinary panel.

The appendix filed by the appellant is stricken. The record has been

transmitted by the district court. See 10th Cir. R. 10.2.2. ("In pro se appeals . . . the clerk of the district court shall transmit the record to the clerk of the court of appeals . . .").

The appellee's motion to file a supplemental appendix is denied without prejudice to being renewed before the disciplinary panel.

APPEAL DISMISSED.

Entered for the Court
PATRICK FISHER
Chief Deputy Clerk

By:
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

No. 94-1127

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES EDWARD QUALLS,

Plaintiff-Appellant,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Defendants-Appellees.

ORDER ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON OCTOBER 17, 1994

Due to clerical error the order issued October 11, 1994, is reissued as follows:

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Chief Deputy Clerk

By:
Audrey F. Weigel
Deputy Clerk

No. 94-1314

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES EDWARD QUALLS,

Plaintiff-Appellant,

and

DAVID L. SMITH,

Attorney-Appellant,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Defendants-Appellees.

ORDER ISSUED BY A HEARING PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON JANUARY 5, 1995

This matter comes on for consideration of the parties' responses to this court's notice of jurisdictional defect.

If this notice of appeal is treated as such, then this appeal would be dismissable for lack of jurisdiction.

However, we elect to treat the notice of appeal as a petition for writ of mandamus. We take judicial notice of the fact that on October 11, 1994 the district court entered an order lifting the stay and setting the case for trial for October 28, 1995.

Accordingly, the petition is DENIED.

The appellee's motion for leave to supplement the appendix is denied.

The appellant's request for sanctions against the appellant is denied.

The appellee's request for sanctions is referred to the disciplinary panel.

Entered for the Court
PATRICK FISHER, Clerk

By:
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

Supreme Court, U.S.
FILED
FEB 15 1995
CLERK

No. 94-1283

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROLF G. ASPHAUG, ESQ.
(Counsel of Record)
1600 Blake Street
Denver, CO 80202
Telephone: 303/299-2203
Attorney for Respondents

February 15, 1995

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the District Court's stay orders of February 16, 1994 and June 17, 1994 were subject to interlocutory appeal under 28 U.S.C. § 1292(a)(1).

2. If the stay orders were subject to interlocutory appeal, whether the stay orders were an abuse of discretion.

LIST OF PARTIES

The parties to the proceedings below were petitioners James Edward Qualls and his attorney David L. Smith, and respondents Regional Transportation District ("RTD"), Richard Bauman, Robert Garside, Richard Reynolds, Ellsworth Walker and James Misek.

Petitioner Qualls was the sole appellant in *Qualls v. Regional Transp. Dist.,* No. 94-1127 (10th Cir. Sept. 14, 1994; Oct. 17, 1994). Petitioners Qualls and Smith were both appellants in *Qualls v. Regional Transp. Dist.,* No. 94-1314 (10th Cir. Jan. 5, 1995).

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No. 94-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioners are asking this Court to vacate a temporary stay of District Court proceedings that was *already* vacated by the District Court over four months ago.

Petitioners' statement of the case contains numerous misrepresentations and statements not "material to the consideration of the questions presented." Sup. Ct. R. 24.1(g). Pursuant to

Astonishingly, instead of responding to the Tenth Circuit's opinion and attempting to distinguish *Gulfstream* and the other cases cited therein, petitioners have merely copied in their petition to this Court — virtually *word for word* — their unsuccessful jurisdictional argument before the Tenth Circuit.

Third and finally, petitioners' claim that the District Court stay orders were "unconstitutional" abuses of discretion is as frivolous as their claim regarding appellate jurisdiction. *See* Petition at 20-23. None of the cases cited by petitioners is remotely on point. The District Court exercised appropriate discretion in imposing a temporary stay pending resolution of Smith's status to practice before the District Court.

Due to the utterly frivolous and harassing nature of the petition, respondents request an award of just damages and double costs against both petitioners as authorized by Sup. Ct. R. 42.2. Respondents are today filing a motion for such relief.

ARGUMENT

I. The Issue is Moot.

The issue for which certiorari review is sought is patently moot, and the petition is therefore frivolous. Petitioners are asking this Court to force the Tenth Circuit to review a stay already vacated by the District Court over four months ago.

"[R]eview in this Court will be allowed only where its judgment will have some material effect." *Pollard v. United States*, 352 U.S. 354, 358 (1957). In this case, even if interlocutory appeal were available and petitioners could somehow succeed on the merits, review in this Court would have absolutely no material effect.

II. A Stay is not an Appealable Injunction

It is well settled — in opinions of this Court, the Tenth Circuit, and other circuits — that a party cannot seek interlocutory appellate review of a temporary pretrial stay of proceedings

by characterizing the stay as an appealable "injunction" under 28 U.S.C. § 1292(a)(1).

This Court's ruling in *Gulfstream, supra,* is dispositive. Petitioners have not even attempted to explain how the Tenth Circuit possibly erred in citing *Gulfstream* in support of the conclusion that the stay was not an appealable injunction.

Petitioners' failure to address *Gulfstream* is perhaps not surprising, considering that their argument before this Court is, incredibly, nothing more than a *copy* of petitioners' previously unsuccessful argument before the Tenth Circuit. [2] That petitioners are presenting this Court with merely a copy of their previously discredited argument before the Tenth Circuit is compelling evidence of the true mission of their petition: not to advance legitimate legal arguments, but merely to harass the respondents and the courts with frivolous filings.

Petitioners have also failed to acknowledge, let alone distinguish, a second case cited by the Tenth Circuit in dismissing the "injunction" argument (see Petitioners' Appendix at iv): *Hamilton v. Robertson*, 854 F.2d 740 (5th Cir. 1988). The Tenth Circuit concurred with the Fifth Circuit's recognition in *Hamilton* of

> a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable . . . .

854 F.2d at 741.

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[2] *Compare* Opening Brief for Plaintiff-Appellant (Case No. 94-1127, May 2, 1994), at 13-14, reproduced at pages 4-5 of Respondents' Appendix; *and* Opening Brief for Plaintiff-Appellant James Edward Qualls and His Attorney, Appellant David L. Smith (Case No. 94-1314, Sept. 1, 1994), at 16-18, reproduced at pages 6-7 of Respondents' Appendix; *with* Petition at 16-19. With the exception of a few minor changes (mainly to reflect the different courts and stay orders involved), the contents of the jurisdiction argument in all three documents are virtually identical.

At page 18 of the petition, petitioners cite — as they did before the Tenth Circuit, without explanation — the case of *Mai Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978 (10th Cir. 1992) as apparent support for their position. In fact, as respondent RTD had already pointed out to petitioners before the Tenth Circuit, [3] *Mai Basic Four* contradicts rather than supports petitioners' argument: " 'Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1).' " 962 F.2d at 981, *quoting Switzerland Cheese Ass'n v. E. Horne's Market*, 385 U.S. 23, 25 (1966).

Petitioners have also quoted at length — again without explanation, just as in their Tenth Circuit filings — from *Tri-State Generation and Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989). *See* Petition at 16-18. However, neither the *Tri-State* decision nor any of the opinions cited within that decision discussed whether a stay is an appealable injunction.

In appellate proceedings before the Tenth Circuit, respondent RTD advised petitioners of several other cases supporting the position that stay orders are not injunctions subject to interlocutory appeal. [4] *See Frutiger v. Hamilton Cent. School Dist.*, 928 F.2d 68, 72 (2d Cir. 1991); *Federal Land Bank of Spokane v. L.R. Ranch Co.*, 926 F.2d 859, 864 (9th Cir. 1991); *Pepper v. Miani*, 734 F.2d 1420, 1421-22 (10th Cir. 1984). Petitioners have failed to acknowledge or discuss any of these cases as well.

Indeed, petitioners have failed to present *any* rational argument as to why the Tenth Circuit's rulings merit review on certiorari by this Court. *See* Sup. Ct. R. 10.1.

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[3] The portion of respondent's brief to the Tenth Circuit discussing *Mai Basic Four* is reproduced at pages 8-9 of Respondents' Appendix.

[4] *See* Respondents' Appendix at 8-9.

III. The District Court did not Abuse its Discretion

Petitioners' claim that the District Court's stay orders were somehow an unconstitutional abuse of discretion is as frivolous as petitioners' claim of appellate jurisdiction. The District Court had ample grounds temporarily to stay pretrial proceedings pending determination as to whether Smith was legally entitled to practice law.

This and other courts have repeatedly recognized the District Courts' broad, discretionary powers to stay proceedings in order to control their dockets and promote economical litigation. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 10 n.11 (1983); *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir.), *cert. denied*, 498 U.S. 897 (1990); *Schall v. Joyce*, 885 F.2d 101, 104 (3d Cir. 1989).

None of the cases cited by petitioners is remotely relevant to the propositions for which it is cited. None of those cases holds that a stay order is an unconstitutional infringement on a litigant's rights to petition for redress of grievances, to a jury trial, and to counsel. None of the cases holds that a stay order is unconstitutional punishment of an attorney, or interference with an attorney's alleged right to represent a client. Respondents are aware of no cases in support of these propositions.

IV. Petitioners Should Pay Damages and Double Costs for Filing a Frivolous Petition

In a previous case brought against respondent Regional Transportation District by petitioner Smith, the Tenth Circuit noted:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts . . . . Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal

> proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

Casillan v. Regional Transp. Dist., No. 92-1009 (10th Cir. Jan. 15, 1993).

As shown above, the petition in this case is utterly frivolous. Nevertheless, respondents could not merely ignore the petition. Pursuant to Sup. Ct. R. 15.1, respondents have had to expend substantial time and costs in preparing a brief in opposition to the petition while at the same time continuing to litigate the underlying case in District Court.

This is not the first time that petitioner Smith has burdened the courts and respondent Regional Transportation District with apparently frivolous filings. Sup. Ct. R. 42.2 exists precisely in order to deter frivolous petitions such as this, and respondents respectfully request that the rule be utilized to the fullest extent possible in this case. Respondents are today filing a motion seeking such relief.

CONCLUSION

For the reasons presented above, respondents request that the Court deny certiorari, hold the petition to be frivolous, and award respondents just damages and double costs against both petitioners.

Dated February 15, 1995.

Respectfully submitted,

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Telephone: 303/299-2203
Attorney for Respondents

No. 94-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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Attorney for Respondents

February 15, 1995

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IN THE
United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

The matter before the Court is Defendant RTD's Motion To Stay Proceedings And To Vacate Trial Setting. After careful consideration, the Court finds that this case should be stayed pending the Committee on Conduct's determination of plaintiff's counsel's status. Accordingly, it is

ORDERED that Defendant RTD's Motion To Stay Proceedings And To Vacate Trial Setting is granted. It is

FURTHER ORDERED that the trial date of April 25, 1994, is hereby vacated. It is

FURTHER ORDERED that, in view of Chief Magistrate Judge Donald E. Abram's Orders of January 25 and January 28, 1994, the hearing on defendant's motion for sanctions, set on March 10, 1994, is hereby vacated. It is

FURTHER ORDERED that this case is stayed pending the Committee On Conduct's determination of plaintiff's counsel's status. It is

FURTHER ORDERED that plaintiff shall notify the Court when a decision is made regarding plaintiff's counsel's status.

DATED at Denver, Colorado, this 16th day of February, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE

United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

The matter before the Court is plaintiff's Notice, filed May 10, 1994, informing the Court that the Committee on Conduct has made a recommendation concerning plaintiff's counsel's status. After reading the recommendation, the Court determines that this case should continue to be stayed pending final action by the United States District Court for the District of Colorado on the Committee's recommendation. Accordingly, it is

ORDERED that this case is stayed until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status. It is

FURTHER ORDERED that plaintiff shall notify the Court when such final action is taken by the District Court.

DATED at Denver, Colorado, this 17th day of June, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE

United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

Although final action on plaintiff's counsel's status has not yet been taken, it appears to be appropriate to vacate the stay on this case and to set it for trial. Accordingly, it is

ORDERED that the stay is vacated. It is

FURTHER ORDERED that this matter is set for trial to Court for five days commencing on Monday, October 23, 1995, at 10:30 a.m. in Courtroom C-502, United States Courthouse, 1929 Stout Street, Denver, Colorado.

DATED at Denver, Colorado, this 11th day of October, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

Excerpts from Opening Brief for Plaintiff-Appellant in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1127, May 2, 1994)

(page 13, line 5, to page 14, line 26)

IV. ARGUMENT

A. THE ORDER BEING APPEALED IS AN APPEALABLE ORDER UNDER 28 § U.S.C. 1292(a)(1).

In *Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc.,* 874 F.2d 1346 (10th Cir. 1989), this Court said:

> We must first determine whether or not we have jurisdiction to hear this appeal and, if so, the scope of that jurisdiction. As a general rule, only final decisions of the district courts are appealable. 28 U.S.C. § 1291 (1982). A statutory exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1) (1982), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."
>
> Tri-State and REA appeal the district court's order which expressly denies their request for a permanent injunction. Although the order is interlocutory, [footnote omitted] it is appealable under section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides us with jurisdiction to hear this appeal.
>
> We agree with the Eleventh Circuit in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1471 (11th Cir. 1985), that an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1). Cases such as *Carson v. American Brands, Inc.,* 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), and *Stringfellow v.*

> *Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177, 1183-84, 94 L.Ed.2d 389 (1987), which require an additional showing that the interlocutory order might have a "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal, are inapposite. *Carson* and its progeny do not deal with interlocutory orders that explicitly deny or grant a motion for injunctive [*sic*] but with orders that have "the practical effect of refusing an injunction." *Carson*, 450 U.S. at 84, 101 S.Ct. at 996; see *I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc.*, 789 F.2d 21, 24 n. 3 (D.C.Cir.) ("*Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."), *cert. denied*, 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure* § 3924 (1977 & Supp. 1987) [hereinafter Wright & Miller]. When an order, although not expressly denying or granting an injunction, has the practical effect of doing so, the *Carson* line of cases extends the coverage of section 1292(a)(1) and allows the order to be appealable under that section, but only if the additional requirements are satisfied.

Id. at 1351. *See also Mai Basic Four, Inc.* v. *Basis, Inc.*, 962 F.2d 978, 980-83 (10th Cir. 1992).

In the present case, Mr. Qualls appeals Judge Weinshienk's (February 16, 1994) Order which expressly grants Mr. Asphaug's and Ms. Wheeler's motion for a stay of the case "pending the Committee on Conduct's determination of plaintiff's counsel's status." Although the order is interlocutory, it grants injunctive relief and is therefore appealable under the plain language of section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides this Court with jurisdiction to hear this appeal.

Excerpts from Opening Brief for Plaintiff-Appellant James Edward Qualls and His Attorney, Appellant David L. Smith in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1314, September 1, 1994)

(page 16, line 15, to page 18, line 3)

IV. ARGUMENT

A. JUDGE WEINSHIENK'S (JUNE 17, 1994) ORDER IS AN APPEALABLE ORDER UNDER 28 U.S.C. § 1292(a)(1).

In Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989), this Court held:

> We must first determine whether or not we have jurisdiction to hear this appeal and, if so, the scope of that jurisdiction. As a general rule, only final decisions of the district courts are appealable. 28 U.S.C. § 1291 (1982). A statutory exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1) (1982), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."
>
> Tri-State and REA appeal the district court's order which expressly denies their request for a permanent injunction. Although the order is interlocutory, [footnote omitted] it is appealable under section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides us with jurisdiction to hear this appeal.
>
> We agree with the Eleventh Circuit in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1471 (11th Cir. 1985), that an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1). Cases such as *Carson v. American Brands, Inc.,* 450 U.S. 79, 84, 101

> S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), and *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 107 S.Ct. 1177, 1183-84, 94 L.Ed.2d 389 (1987), which require an additional showing that the interlocutory order might have a "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal, are inapposite. *Carson* and its progeny do not deal with interlocutory orders that explicitly deny or grant a motion for injunctive relief but with orders that have "the practical effect of refusing an injunction." *Carson,* 450 U.S. at 84, 101 S.Ct. at 996; *see I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc.,* 789 F.2d 21, 24 n. 3 (D.C.Cir.) ("*Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."), *cert. denied,* 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure* § 3924 (1977 & Supp. 1987) [hereinafter Wright & Miller]. When an order, although not expressly denying or granting an injunction, has the practical effect of doing so, the *Carson* line of cases extends the coverage of section 1292(a)(1) and allows the order to be appealable under that section, but only if the additional requirements are satisfied.

Id. at 1351. *See also Mai Basic Four, Inc. v. Basis, Inc.,* 962 F.2d 978, 980-83 (10th Cir. 1992).

In the present case, Mr. Qualls and his attorney appealed Judge Weinshienk's (June 17, 1994) order, which expressly stayed Mr. Qualls' case "until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status." Although the order is interlocutory, it grants injunctive relief and is therefore appealable under the plain language of section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides this Court with jurisdiction to hear this appeal.

Excerpts from Appellee RTD's Memorandum Brief on Jurisdictional Issue in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1314, August 2, 1994)

(page 4, line 3, to page 5, line 12)

A. THE ORDER IS NOT APPEALABLE UNDER § 1292(A)(1)

Qualls' appeal is not from an injunction or other interlocutory order, and is therefore not appealable under 28 U.S.C. § 1292(a)(1). As this Court stated in *Mai Basic Four, Inc. v. Basis, Inc.,* 962 F.2d 978 (10th Cir. 1992):

> "Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)."

Id. at 981, *quoting Switzerland Cheese Ass'n v. E. Horne's Market, Inc.,* 385 U.S. 23, 25, 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966).

It is well settled that interlocutory orders, such as Judge Weinshienk's latest order merely continuing a prior stay, are not appealable under § 1292(a)(1). Indeed, any argument to the contrary is frivolous. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279, 108 S.Ct. 1133, 1138, 99 L.Ed.2d 296 (1988) (district court order staying or refusing to stay a case "ordinarily is not considered an injunction"); *Federal Land Bank of Spokane v. L.R. Ranch Co.,* 926 F.2d 859, 864 (9th Cir. 1991); *Pepper v. Miani,* 734 F.2d 1420, 1421-22 (10th Cir. 1984). *See also Frutiger v. Hamilton Central School District,* 928 F.2d 68, 72 (2d Cir. 1991) (citing *Pepper, supra,* and other cases for "well settled" and "well established" rules that orders granting continuances and stays are not injunctions appealable under § 1292(a)(1)).

In appeal No. 94-1127, Qualls and Smith cited *Mai Basic Four, supra,* and *Tri-State Generation & Transmission Association v. Shoshone River Power, Inc.,* 874 F.2d 1346 (10th Cir. 1989), for the proposition that the original stay order was immediately appealable. As RTD noted in its motion for sanctions in appeal No. 94-1127, neither of these cases pertained to orders granting a stay or vacating a trial setting, and *Mai Basic Four* actually contains dicta directly contrary to Qualls' and Smith's claims.